

# United States Circuit Court of Appeals

For the Ninth Circuit

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JAMES A. RUSSELL,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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**Brief of Plaintiff in Error**

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN  
DIVISION.

JOHN F. DORE, of Seattle, Wash.,

J. L. FINCH, of Seattle, Wash.,

*Attorneys for Plaintiff in Error.*

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# United States Circuit Court of Appeals

For the Ninth Judicial Circuit

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No. 3598.

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JAMES A. RUSSELL,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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JOHN F. DORE, of Seattle, Wash.,

J. L. FINCH, of Seattle, Wash.,

*Attorneys for Plaintiff in Error.*



## STATEMENT OF THE CASE.

Writ of Error to the United States District Court of the State of Washington, Northern Division, upon conviction upon the first of two counts of an indictment. The count in question charged that plaintiff in error, with intent to defraud one Julius Taylor, "did then and there falsely assume and pretend to be an officer and employee acting under the authority of the United States, to-wit, a revenue officer and employee, and in such pretended character" did fraudulently demand and obtain from said Taylor the sum of \$80.00, contrary to the statute, etc. (Tr. pp. 1 and 2). The statute involved is section 5438 Revised Statutes, as amended, being section 10196 of the Compiled Statutes, commonly known as the "false personation" statute.

The evidence of the government was furnished in the main by two witnesses, one Julius Taylor, and one Henry V. Hansen. Taylor testified that plaintiff in error, with an unknown companion, visited his apartment and throwing back his coat and showing a badge announced, "We are from the Federal government." He then broached the subject of intoxicating liquor, and being invited to make a search of the premises, left the room, leaving the witness and the unidentified man together.

The evidence does not disclose what, if any thing was found, but while plaintiff in error was gone the witness, after a conversation with the stranger, concluded to offer plaintiff in error a bribe. When the latter returned the witness tossed \$80.00 upon a table with the remark, "If this will do you boys any good, we will call this thing square." And the witness said that plaintiff in error picked up the money, and the two made off. (Tr. pp. 23, 24, 25, 26 and 27).

Hansen testified that the announcement of plaintiff in error was, "I am a Federal man." (Tr. p. 28).

The government then introduced, as the badge exhibited by plaintiff in error to the witnesses Taylor and Hansen, a badge that government officials had taken off plaintiff in error upon another occasion. (Tr. p. 30; and see original exhibit, Gov't's. Exhibit 1).

It was conceded by the government that the plaintiff in error was an employee of the United States government, being stationed at Bremerton, Washington, and working in the construction and repair department of the navy yard located at that point. It was also conceded that he has been so employed for the past four years, and was such employee even

upon the day of trial. It is also conceded that, as such employee, the government had issued to him a badge of identity and authority, which badge he has worn constantly for the past three years, or until March 22, 1920. Upon the latter date he engaged in a contraband liquor episode at Meadowdale, Washington, when and where he was arrested and his badge taken off him by Federal Prohibition officers. (Tr. pp. 31-32 and 33). This is the badge the government offered in evidence as the badge worn by plaintiff in error and exhibited by him to Taylor and Hansen. (Tr. p. 30). Plaintiff in error denied any and all knowledge of the alleged transaction. (Tr. pp. 31 and 32), but the jury having resolved the question against him, he is foreclosed on that point here.

At the close of the Government's case, plaintiff in error moved the court for a directed verdict, which was denied, and an exception allowed. (Tr. p. 31). And at the end of the trial he renewed the motion, which was again denied, and an exception again allowed. (Tr. p. 33). This action of the court was assigned as error, (Tr. p. 13, assignment Nos 1 and 2), and is the only error to be pressed here.

### ARGUMENT.

Plaintiff in error contends:

(1) *That there was a fatal variance between the charge contained in the indictment and the proof introduced by the government;*

(2) *That, even if plaintiff in error did make the representations testified to, he but spoke the truth, and hence was guilty of no "false personation";*

(3) *That, if he did obtain the \$80.00, he obtained it in no "pretended character."*

(1) *That there was a fatal variance between the charge contained in the indictment and the proof introduced by the government.*

The indictment charges plaintiff in error "did then and there falsely assume and pretend to be an officer and employee acting under the authority of the United States, to-wit, a revenue officer and employee." The evidence offered by the government in support of the charge was given by two witnesses, Taylor and Hansen. Taylor testified that plaintiff in error said, "We are from the Federal government." Hansen testified the remark was, "I am a Federal man." Neither supported the charge. Taylor's version indicates plaintiff in error stated the *place whence* he came. "I am from the Federal government" does not carry with it any representation that the speaker is an officer of such government. He might be but an employee.



he might be but a messenger, and he might be lying outright. But by no construction can it be made to mean "I am a revenue officer."

Hansen's version, "I am a Federal man," comes nearer the mark, in comparison with Taylor's but it, too, falls far short of requirements. A "Federal man" is probably "an officer or employee" of the government. But if it was necessary for the pleader to specify in the indictment the *kind* of an officer appellant represented himself to be, (as it was, and as he did), it was equally necessary for the proofs to show the same thing.

A postmaster, as well as the Secretary of State, is a "Federal man." But neither one is a "revenue officer." The pleader, having in mind the circumstances of the transaction, evidently thought the appropriate words should have been, "I am a revenue officer," and he accordingly put those words into the mouth of plaintiff in error. But he received no support from his witnesses. The variance is fatal. Having stated the kind of an officer the accused represented himself to be, the government must prove it as alleged.

*State v. Phillips*, 27 Wash. 364.

*Allen v. State*, 8 Tex. App. 360.

*Marshal v. State*, 7 Am. 415, 75 S. W. 584.

*Hamilton v. State*, 60 Ind. 193, 28 Am. Rep. 653.

(2) *That, even if plaintiff in error did make the representations testified to, he but spoke the truth, and was guilty of no "false personation."*

Regardless of any particular shade of meaning in the remarks, "I am from the Federal government," or, "I am a Federal man," there was no false personation; for, in connection with plaintiff in error's remark, whatever it was, both witnesses testified he threw back his coat and exhibited a badge; and the government then introduced in evidence plaintiff in error's badge issued to him by the government, as the badge he exhibited upon that occasion.

Wherein, then, did plaintiff in error violate the "false personation" statute? He was, indeed, "from the Federal government." He was, also, "a Federal man." Neither statement was false. His mission was not creditable, to be sure; but he spoke no falsehood. Suppose, the United States Marshal were to meet a man in a dark alley and, drawing his weapon and exhibiting his star, were to say to the wayfarer, "I am a United States Marshal. How much money have you on your person?" He would be guilty of a crime, and should be in the penitentiary. But not because he had *falsely pretended*

to be a United States Marshal! To invoke the false personation statute to fit such circumstances would be the height of absurdity. But no less absurd is the case at bar.

The government itself introduced the badge. It was a genuine badge, and made absolutely good the verbal representations imputed to plaintiff in error. Wherein, then, did plaintiff in error falsely "assume" or "pretend" anything? And why should the case not have been taken from the jury?

(3) *That if he did obtain the \$80.00, he obtained it in no "pretended character."*

The remarks made under (2) above apply again. *Taylor's \$80.00, but he did not do so*  
 Plaintiff in error may have "obtained" in any "pretended character." If the facts be as alleged, no doubt a state statute could be found to fit the circumstances. But the Federal personation statute, upon which this indictment was predicated, has no pertinancy.

Respectfully submitted,

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J. L. FINCH, of Seattle, Wash.

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